

# Affirmation of Jason Habinsky

Exhibit

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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PHILIP FEI, on behalf of  
himself and classes of  
those similarly situated,

Plaintiffs,

vs.

No. 07 Civ. 8785

WEST LB AG,

Defendant.

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DEPOSITION OF VIVIAN J. YOST

New York, New York

Thursday, May 15, 2008

Reported by:

SHAUNA STOLTZ-LAURIE

CSR NO. 810490

1 Yost

2 Q. Okay. And is this the list of the  
3 staff members that you had mentioned a few  
4 moments ago?

5 A. Yes.

6 Q. And is this the list of all the  
7 individuals -- all the executives that you  
8 were collecting job descriptions for?

9 A. Yes.

10 Q. Okay. And you mentioned another  
11 one of your job duties as a consultant at  
12 West LB was FLISA (ph.) work?

13 A. Excuse me?

14 Q. Was FLISA (ph.), was FLSA work?

15 A. Oh, okay. I've never heard it  
16 pronounced that way.

17 Q. We lawyers get in the habit of  
18 doing that.

19 A. Okay.

20 Q. So what FLSA work did you have at  
21 West LB?

22 A. I tested the individuals that were  
23 in the executive job category for exemption  
24 status.

25 Q. And are those individuals the ones

1 Yost

2 instructions on how to conduct exemption  
3 testing?

4 A. No.

5 Q. And so did you conduct it based on  
6 your own knowledge and experience --

7 A. Yes.

8 Q. -- in this area?

9 And about how long did it take you  
10 to conduct the exemption testing of the  
11 executives?

12 A. I don't remember, but it was not a  
13 quick process. It was lengthy.

14 Q. And what, if anything, did anyone  
15 from West LB give you to conduct the  
16 exemption testing? And I mean what  
17 information or what documents.

18 A. Anyone from West LB?

19 Q. Yes.

20 A. Well, the Human Resource -- not the  
21 Human Resources. Excuse me. The managers  
22 gave me job descriptions that I had either  
23 asked for or helped them have their staff  
24 members create.

25 Q. Apart from the job descriptions,

1 Yost

2 descriptions, the salaries and the official  
3 job titles, to conduct this exemption  
4 testing?

5 A. I reviewed the job description to  
6 see if I understood the general scope and  
7 responsibility of the individual, and then I  
8 went back -- well, no, I take that back. I

9 reviewed the job description, and inevitably  
10 I would have questions about the duties, and  
11 I would go back to the manager and/or the  
12 employee to ask specific questions about  
13 their duties to make sure that I understood  
14 their duties so that I could perform an  
15 exemption test.

16 Q. Okay, and which executives did you  
17 go back to?

18 A. I don't remember. I would always  
19 have a conversation with the manager about  
20 the group of executives that reported to  
21 them, but I don't remember what executives I  
22 spoke to in addition to their manager.

23 Q. Okay, and what did you do next?

24 A. If I felt that I understood  
25 clearly, after having the conversation with

1 Yost

2 the manager, this individual's duties and  
3 responsibilities, then I would -- I had  
4 pulled out the Federal Register that had the  
5 latest rule -- the latest descriptions of the  
6 -- all of the exemption categories, of which  
7 there were five, and I would review those  
8 against the job description and my notes from  
9 the manager on that job description and those  
10 individual's duties, and determine if that  
11 individual qualified for an exemption.

12 Then I had a computer program I  
13 used -- I think it was called the Overtime  
14 Exemption Expert, or something like that --  
15 and I would then plug -- answer questions in  
16 that program to see if that program came up  
17 with the same determination that I came up  
18 with. And I don't ever remember with it  
19 coming up with a determination that was  
20 contrary to my determination. And I printed  
21 out from that Overtime Exemption Expert  
22 program whether they qualified for an  
23 exemption or not, and I attached that to the  
24 job description and made that part of my  
25 documentation trail. I mainly used that

1                                   Yost

2           Overtime Exemption Expert for documentation  
3           and to confirm my determination.

4           Q.    And then what did you do next?

5           A.    I marked the job description exempt  
6           or nonexempt, and compiled all of that data  
7           into spread sheets, determining who was  
8           currently exempt and needed to be moved to

9           nonexempt, who did not qualify for an  
10          exemption, who could remain exempt, did  
11          qualify for an exemption, and I don't  
12          remember if there were any other categories  
13          there in between.  Individuals that were  
14          currently nonexempt that could be moved to  
15          exempt, that would be another category.  I  
16          think there were three categories.

17          Q.    Okay.  Did you create any other  
18          documents, other than that spread sheet that  
19          you're describing, after you completed the  
20          exemption testing?

21          A.    I don't remember.

22          Q.    Okay.  Did you ever complete and  
23          draft any PowerPoint presentations regarding  
24          the work that you did?

25          A.    I don't remember.

1 Yost

2 talked to people and you interviewed  
3 individuals, but I just want to know, looking  
4 at this job description alone, could you  
5 reach a determination on whether this person  
6 should be classified as exempt or nonexempt?

7 A. No.

8 MR. HABINSKY: Objection.

9 Sorry.

10 Q. Is there any way you can reach a  
11 determination based on this document alone?

12 A. I would need to -- because it's not  
13 the document that's exempt or not or not  
14 exempt, it's the person, I would need to know  
15 the person, understand how the person  
16 performed these duties, to make the  
17 determination.

18 Q. Okay. Is there any way someone  
19 could perform these duties, setting aside the  
20 salary questions, but they could perform  
21 these duties that would result in them being  
22 classified as exempt?

23 A. Are you -- I'm not sure I  
24 understand what you're asking me.

25 Q. Okay, let me rephrase it then.



1 Yost

2 hiring, terminations and performance

3 reviews."

4 Q. So you can?

5 A. Yeah.

6 Q. Okay. Can you determine based on

7 this job description alone whether this

8 person should be classified as exempt or

9 nonexempt?

10 A. No.

11 Q. Okay. You would need to talk to

12 the person or their manager?

13 A. Right.

14 I just want to add one thing.

15 Q. Sure.

16 A. I also at times spoke to the Human

17 Resources representative for that department

18 who had intimate knowledge of the duties and

19 responsibilities of the individuals.

20 Q. Was that as part of your exemption

21 testing?

22 A. At times it would be.

23 Q. Did you also do that when you were

24 working on the job descriptions project?

25 A. I don't remember.